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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM ARROYO,

Defendant and Appellant.

A152084

(San Mateo County
Super. Ct. No. SF399827B)

**ORDER DENYING REHEARING
AND MODIFYING OPINION
[NO CHANGE IN JUDGMENT]**

THE COURT:

Appellant's petition for rehearing is DENIED. The opinion filed on July 3, 2019, shall be MODIFIED as follows:

1. On page 8, the final sentence in the first partial paragraph shall be modified to italicize the phrase: "*when a parole board eventually looks at this case 53 years from now [it] will understand the gravity and the seriousness*"

2. On page 8, the final paragraph of the Discussion section shall be modified to add three sentences so that it reads:

Because the trial court had sentencing discretion with respect to the reckless driving count (Veh. Code, § 2800.2, subd. (a); § 18), Arroyo had reason to argue any mitigating circumstances that applied—at least those relating to himself (Cal. Rules of Court, rule 4.423(b)). But, despite obtaining a continuance of sentencing in order to prepare mitigation evidence, neither defense counsel nor the probation report cited any. With respect to Arroyo's intentional and premeditated shooting of Garduno Vega, the trial court stated several aggravating factors on the record, and Arroyo does not argue any mitigating circumstances in his appellate briefs. (See Cal. Rules of Court, rules 4.421, 4.423(a).) While ordinarily we would not

presume to divine how the trial court would exercise its discretion, here the court was unequivocal. We are confident it would not have struck the section 12022.53 enhancement if it had the discretion to do so, and remand would therefore be futile. (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425; *People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

The modification effects no change in the judgment.

Dated: _____, P.J.

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Abraham Arroyo and codefendant Armando Carranza were charged and tried before separate juries for murder (Pen. Code, § 187, subd. (a))¹ and accompanying gang and firearm enhancements (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (d), (e)). The jury convicted Arroyo of first degree murder and a count of reckless driving while fleeing a police officer (Veh. Code, § 2800.2, subd. (a)). The jury also found true enhancement allegations that Arroyo committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and he personally and intentionally discharged a gun causing death (§ 12022.53, subd. (d)). Arroyo contends the gang enhancement instruction inadequately explained the meaning of “in association with,” and an amendment to section 12022.53, subdivision (h), requires remand so the trial court may consider striking the term imposed for a firearm enhancement. We affirm.

¹ Undesignated statutory references are to the Penal Code.

BACKGROUND

A.

In August 2015, Arroyo shot Felix Garduno Vega in an alley behind a house where a barbeque was underway. Garduno Vega died of wounds to his chest and back. Garduno Vega was a Sureño gang member associated with the Coastside Locos. The gang's territory included the block in Half Moon Bay where he died. Carranza's girlfriend, Laura Sanabria, was also associated with the Coastside Locos. At the time of the murder, 19-year-old Arroyo and 35-year-old Carranza were coworkers at a restaurant and members of another Sureño gang, the Carnales Locos Sureños Trece (Carnales Locos), whose territory was in Redwood City.

A Coastside Locos member invited Carranza and Arroyo to the barbeque. They arrived and greeted other attendees, including Garduno Vega, in a friendly manner, but did not stay long. They went to Sanabria's mother's home, where Sanabria and Carranza argued. The People presented evidence Carranza was jealous of other men in Sanabria's life, including Garduno Vega. Just before Carranza and Arroyo returned to the barbeque, Carranza appeared drunk and angry. In reference to Sanabria, he said, "Fuck this bitch," and in reference to an unspecified person, "I'm going to fuck up this asshole." Arroyo responded, "Let's go."

Arroyo and Carranza returned to the barbeque in Half Moon Bay with a "different vibe." Carranza asked to speak to Garduno Vega. The three walked to a nearby alley, where Arroyo stood behind Carranza. Witnesses described an argument between Carranza and Garduno Vega immediately before the shooting. Sanabria received a phone call from Garduno Vega, and she could hear he and Carranza arguing about her. Witnesses heard shots and then saw Arroyo and Carranza leave in a white Acura. Garduno Vega stumbled towards the house and said, "They got me."

Arroyo and Carranza separated, and Carranza was picked up by Sanabria and her brother. Arroyo retrieved belongings from his cousin's home in Redwood City and said he had "fucked up" before leaving in a white car. About 30 minutes after the shooting, Arroyo texted his girlfriend, "I need to see my son one last time."

In the early morning hours of the following day, a San Mateo County deputy sheriff attempted to pull the Acura over for a Vehicle Code violation. Arroyo drove approximately 50 miles per hour through a residential neighborhood, crashed the car, and then escaped on foot. The deputy found a semiautomatic handgun in the abandoned Acura. It was later determined to be the gun used to kill Garduno Vega. About a week after the murder, Arroyo was arrested. Arroyo admitted evading pursuit in the Acura but gave a false alibi for the time of the shooting.

Jamie Draper testified as an expert on criminal street gangs. According to Draper, Carnales Locos is a Sureño criminal street gang composed of approximately 10 people, who use common signs and symbols (the color blue, the numbers 3 and 13, the acronym RWC for Redwood City, the letter and number combination X3), and for whom assault with a deadly weapon is their primary activity. Draper identified evidence of several predicate offenses committed by other Carnales Locos members, including convictions for illegal firearm possession, assault with a deadly weapon, and attempted murder. Draper explained that violent offenses instill fear in the community and assist the gang because, in gang culture, fear and intimidation are synonymous with respect and control.

Draper opined Arroyo and Carranza were active Carnales Locos members, given their tattoos and clothing, association with other gang members, gang graffiti found in a home and holding cell, and the content of certain communications. Draper also testified different Sureño gangs do not always get along and may battle over turf. Sureño gang members in a different gang's territory would need to ensure they were welcome or come with backup.

According to Draper, the fact that a gang member's girlfriend was spending time with another man would be considered a personal matter and not necessarily violate gang rules. But, if the situation made the gang appear weak, the affected member would be expected to regain respect. If an older gang member had been disrespected and needed backup, a younger gang member would be expected to assist. Gang members also commit crimes together to increase their chances of success, such as by providing better opportunities for escape and disposal of evidence.

In late August 2015, the Carnales Locos were concerned with strengthening the gang's image. Just a few days before the murder, Arroyo sent a message to another gang member about putting the gang "on the map" and "controlling the streets," which he recognized "might cost him his life."

Carranza testified Arroyo shot Garduno Vega without prompting and disclaimed any knowledge Arroyo was armed. Although Carranza admitted speaking to Garduno Vega immediately before the shooting, Carranza denied feeling jealousy toward him. Carranza was shaking Garduno Vega's hand when he heard shots fired and saw Garduno Vega fall to the ground. This was when he first realized Arroyo had a gun. Panicking, Carranza ran to the Acura, and Arroyo followed.

Carranza's gang expert opined that Carranza was not an active gang member at the time of the murder. In rebuttal, Sanabria's brother testified that, when Carranza was picked up after the shooting, he said "it was going to be Half Moon Bay against Redwood City," referring to each city's gangs.

B.

The jury convicted Arroyo of first degree murder, as well as reckless driving while fleeing a police officer, and found true all enhancement allegations. The trial court sentenced Arroyo to an aggregate prison term of 53 years to life: 25 years to life for first degree murder (§ 190, subd. (a)), a consecutive term of 25 years to life for the personal and intentional discharge of a firearm enhancement (§ 12022.53, subd. (d)), and the upper determinate term of three years for reckless driving (Veh. Code, § 2800.2, subd. (a); § 18). The trial court stayed punishment on the remaining enhancements (§§ 186.22, subd. (b)(1)(C), 12022.53, subd. (e)).

DISCUSSION

A.

Arroyo contends the trial court erred by failing adequately to define "in association with" in the gang enhancement instruction (CALCRIM No. 1401). We disagree.

1.

A trial court has a sua sponte duty to instruct the jury on general principles of law applicable to the evidence and necessary to the jury's understanding of the case. (*People v. Estrada* (1995) 11 Cal.4th 568, 574; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490.) Accordingly, the court must “instruct on all the elements of the charged offenses and enhancements.” (*People v. Williams* (2009) 170 Cal.App.4th 587, 638–639.)

2.

To find the gang enhancement true, the prosecution had to prove Arroyo committed murder “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

The trial court instructed the jury with CALCRIM No. 1401, which states in part: “If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. To prove this allegation the People must prove that: [¶] 1. The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members.” At the request of the defense, the court elaborated on the meaning of “in association with”: “To prove that an offense was committed ‘in association’ with a criminal street gang, the People must prove that the defendants were both members of the criminal street gang at the time of the crime and that they relied on their common gang membership when they committed the crime.”²

² The court refused Arroyo's request for a more detailed pinpoint instruction on this issue, but, on appeal, Arroyo does not argue that the court erred by doing so.

3.

Arroyo focuses solely on the phrase “in association with.” He contends that the phrase does not adequately distinguish between crimes committed for personal reasons and gang-related crimes. Properly instructed, he argues, the jury might have found he shot Garduno Vega solely for personal reasons (e.g., because Carranza was jealous of the victim’s relationship with Carranza’s girlfriend).

Arroyo is correct that the enhancement only applies to crimes that are gang-related. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Our Supreme Court has explained that the statute does not apply if gang members commit a crime together while they were “ ‘on a frolic and detour *unrelated* to the gang.’ ” (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484, italics added; *Albillar*, at p. 60.) We conclude, however, that the instruction was adequate.

First, Arroyo ignores the last part of the sentence at issue: the crime must be committed “in association with *a criminal street gang*.” (CALCRIM 1401, italics added.) Arroyo does not explain how a jury could connect this murder to a criminal street gang, as the instruction requires, if Arroyo’s motivation was purely personal.

Second, the language of the instruction is commonly understood and derived directly from the statute at issue. “ ‘If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.’ ” (*People v. Estrada, supra*, 11 Cal.4th at p. 574.) The phrase “in association with” means “in connection with” or “together with.” (Merriam-Webster Dict. Online (2019) <<https://www.merriam-webster.com/dictionary/in%20association%20with>> [as of July 2, 2019].) There is nothing ambiguous about that. Arroyo does not attempt to demonstrate it is used in a unique or technical manner in this context. Because the trial court gave an instruction consistent with statutory language that is commonly understood, no further clarification was required. (See *People v. Bolden* (2002) 29 Cal.4th 515, 556; *People v. Williams, supra*, 170 Cal.App.4th at p. 639 [rejecting challenge to CALCRIM No. 1401 regarding specific intent element].)

Third, the jury received further clarification. In addition to CALCRIM No. 1401, the jury was instructed that, to prove the crime was committed “ ‘in association’ with a criminal street gang,” the People had to prove both Arroyo and Carranza were members of a criminal street gang at the time of the crime and they “relied on their common gang membership when they committed the crime.” The language echoes our Supreme Court’s decision in *People v. Albillar*, *supra*, 51 Cal.4th 47, in which the court found substantial evidence supported an association between a rape by gang members and the gang itself. “The record supported a finding that defendants relied on their common gang membership,” in part, based on an expert’s testimony that gang members commit crimes together because it increases their chances of success, they can better deal with contingencies that may arise, and it bolsters their status within the gang. (*Id.* at pp. 60–61.) The People’s expert provided similar testimony here. While we do not hold that the additional clarification was required, it does emphasize the requisite connection between the crime and a criminal street gang. We find no error in the instructions.

B.

Arroyo argues remand is required under a 2017 amendment to section 12022.53, subdivision (h) that allows the trial court to decide whether to strike the firearm use enhancement in furtherance of justice. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand required unless trial court “clearly indicated” it would not have stricken enhancement].) The People contend a remand would serve no purpose because the court’s comments at sentencing, and its imposition of the aggravated term on the reckless driving count, necessarily indicate it would not have struck the firearm enhancement even if it had the discretion at the time to do so. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no remand required when trial court said, “imposing the maximum sentence was appropriate” and defendant was “ ‘the kind of individual the law was intended to keep off the street as long as possible’ ”].) We agree with the People.

At Arroyo’s sentencing, the trial court made clear that Arroyo deserved the maximum sentence. It noted a consecutive 25-years-to-life term on the firearm enhancement was “prescribed by law.” But the court also stated: “[T]his is a vicious

crime which is ultimately a total indictment of the way gangs exist in our society. And this murder was committed for absolutely no reason. It was wanton. It was malicious. It was gratuitous. The victim was vulnerable. [Arroyo] has demonstrated absolutely no remorse, and he deprived [Garduno Vega] and his family of a life, a decent positive life that they could have lived together. [¶] *There's no question that the maximum sentence is absolutely warranted in this case, and is appropriate.* And I am going to order that a transcript of this entire sentencing proceeding be prepared and appended to the records that go to the Department of Corrections so that when a parole board eventually looks at this case 53 years from now [it] will understand the gravity and the seriousness of what occurred here.” (Italics added.)

While ordinarily we would not presume to divine how the trial court would exercise its discretion, here the court was unequivocal. We are confident it would not have struck the section 12022.53 enhancement if it had the discretion to do so, and remand would therefore be futile. (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425; *People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.)

DISPOSITION

The judgment is affirmed.

BURNS, J.

WE CONCUR:

JONES, P. J.

SIMONS, J.

A152084